IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 346.

WILLIAM DANZER & COMPANY, INC., A CORPORATION, PLAINTIFF IN ERROR,

vs.

GULF & SHIP ISLAND RAILROAD COMPANY, A CORPORATION, DEFENDANT IN ERROR.

BRIEF.

This case has come up on writ of error from a judgment of the United States District Court for the Southern District of Mississippi.

The action was based upon a reparation order of the Interstate Commerce Commission and was authorized under section 16, Interstate Commerce Act.

The complaint was drawn in the simple form prescribed by said section 16 and contained, as a part thereof, the findings of fact and order of the Commission. The defendant in error interposed a demurrer, based on three grounds, namely: (1) Section 206 (f), "Transportation Act of 1920" violates the Fifth Amendment to the Constitution inasfar as it in terms renews reparation claims which had become barred; (2) the defendant in error's right to a jury trial was being violated by the proceeding; (3) the Commission had exceeded its lawful authority.

The cause was submitted under a stipulation that

the court should render final judgment, if not on the demurrer then on the general issue and the facts as set out in the findings of the Commission. The court, as aforestated, sustained the demurrer and rendered final judgment thereon, holding that the Constitution prevents retroactive effect to be given section 206 (f) in respect to proceedings for reparation. Since said section refers specifically to reparation proceedings and since it can have no effect whatsoever with respect to such cases unless it be construed retroactively, the decision therefore means that the portion of the statute which refers to reparation proceedings is void under the Constitution.

Writ of error was taken, therefore, directly to the Supreme Court.

The finding of facts by the Commission, as incorporated into the complaint, present the case as it was put before the lower court and (the caption being omitted) was as follows:

"Report of the Commission.

"Division 3, Commissioners Hall, Eastman, and Campbell by Division 3:

"Exceptions were filed by complainant to the report proposed by the Examiner. We have reached conclusions differing from those which he recommended.

"Complainant, a corporation buying and selling lumber at Hagerstown, Md., by complaint filed February 14, 1921, seeks reparation for damages alleged to have been suffered by it through the misrouting of a carload of lumber. On brief, the Pennsylvania Railroad, one of the defendants, urges that complainant's claim was barred by the statute of limitations at the time of the passage of the transportation act, 1920, and that it was not revived by section 206 (f) of that act, providing that the period of Federal control should not be computed as part of the

periods of limitation in claims for reparation arising prior to Federal control. We have found otherwise. Mulkey Salt Co. *vs.* Director General, 61 I. C. C., 669.

"The shipment, consisting of 96,050 feet of 4-foot No. 2 standard yellow pine lath, weighing 56,100 pounds, was delivered to the Gulf & Ship Island at Lyman, Miss., August 30, 1917, by the Ingram-Day Lumber Company, consigned to V. W. Long Lumber Company, Wilkes-Barre, Pa., routed 'N. & W. and Hagerstown.' (fol. 5) The same day complainant purchased it as a 'speculative buy' and in due course came into possession of the bill of lading. On September 5 it wrote to the Division Freight Agent of the Pennsylvania at Harrisburg, Pa., and to representatives of the Cumberland Valley at Chambersburg, Pa., and Hagerstown, requesting that the car 'be held in transit for diversion.' Complainant resold the lath at $5.00 per 1,000 feet and forwarded the invoice to its customer who, in urgent need of such material, had contracted for it because it was in transit. The Gulf & Ship Island made several attempts to forward the car in accordance with routing instructions by transferring it to the New Orleans & Northeastern at Hattiesburg, Mississippi, but that carrier refused to receive it because of an embargo. Eventually, on September 15, the Gulf & Ship Island turned the car over to the Louisville & Nashville, at Gulfport, Mississippi. Moving over the Louisville & Nashville to Louisville, Ky., and Pennsylvania lines beyond, the car arrived in Wilkes-Barre about October 3 without passing through Hagerstown. The shipment was therefore misrouted.

"It appears that when complainant's customer was advised of the arrival of the car at Wilkes-Barre it cancelled the order. While the car was held on the initial line some fourteen or fifteen days, there is no evidence that the sale made by complainant was revoked or that it was obliged to recall its invoice until informed that

the car had arrived at Wilkes-Barre. The Pennsylvania refused to forward the car to Hagerstown unless all charges were paid, including demurrage which had accrued as well as the charges for the (fol. 6) movement from Wilkes-Barre to Hagerstown, and complainant declined to accept delivery. Thereupon the lath was sold at auction by the Pennsylvania for $200.00 and the proceeds applied in partial satisfaction of transportion, demurrage, storage and unloading charges aggregating $473.51.

"Complainant contends that the Gulf & Ship Island could and should have forwarded the car via Gulfport, Miss., and either over the Louisville & Nashville to Birmingham, Ala., Alabama Great Southern to Chattanooga, Tenn., Southern to Bristol, Tenn., and Norfolk & Western to Hagerstown, or over the Louisville & Nashville to Norton, Va., and Norfolk & Western to Hagerstown. The record indicates that these routes were open and that the shipments could have moved via either.

"Defendants contend that we are without jurisdiction to award damages for loss, damage, delay or conversion of property. In L. & N. R. R. Co. *vs.* Ohio Valley Tie Company, 342 U. S., 288, the Supreme Court said:

> " 'The Court of Appeals decided that the Act to Regulate Commerce committed to the Interstate Commerce Commission only the granting of special relief against the making of an overcharge and that the satisfaction of the Commission's award still left open an action in the state courts to recover what are termed general damages—such as are supposed to have been recovered in this case. In this we are of the opinion that the court was wrong.
>
> " 'By Section 8 a common carrier violating the commands of the act is made liable to the person injured thereby "for the full amount of damages sustained in consequence" of the

violation. By Section 9 any person so injured may make complaint to the Commission or may sue in a court of the United States to recover the damages for which the carrier is liable under the act, but must elect in each case which of the two methods of procedure he will adopt. The rule (fol. 7) of damages in one can hardly be different from that proper in the other. . . . The decisions say that whatever the damages were they could be recovered; Pennsylvania R. R. Co. *vs.* International Coal Mining Co., 230 U. S., 184, 202, 203; Meeker *vs.* Lehigh Valley R. R. Company, 236 U. S., 412, 429; and the statute determines the extent of damages. Pennsylvania Railroad Company *vs.* Clark Brothers Coal Mining Co., 238 U. S., 456, 472. We are of opinion that all damages that properly can be attributed to an overcharge, whether it be the keeping of the plaintiff out of its money, dwelt upon by the trial court, or the damages to its business following as a remoter result of the same cause, must be taken to have been considered in the award of the Commission and compensated when that award was paid.'

"The misrouting here was clearly a violation of the interstate commerce act, and the complainant having elected to prosecute its claim before us we may award reparation for whatever damages resulted as a consequence of such unlawful act.

"Witness for complainant testified that the reasonable market value for the lath at Wilkes-Barre in October, 1917, was $5.00 per 1,000 feet or about $480.00 for the entire shipment, and at Hagerstown $4.95 per 1,000 feet. Freight charges from Lyman to Hagerstown over the designated route would have been $168.30.

"We find that complainant made the shipment as described; that it was misrouted; that complainant was damaged by the misrouting in the

amount of the difference between $475.45, which we find to be the fair market value of the lumber in September and October, 1917, at Hagerstown, and $168.30, the freight charges from Lyman to Hagerstown, this difference being $307.15; and that it is entitled to reparation from the Gulf & Ship Island Railroad Company in the sum of $307.15, with interest.

"An appropriate order will be entered.

"(fol. 8) Hall, Commissioner, dissenting in part:

"I agree that this shipment was misrouted. The burden is upon complainant to show that the misrouting was the proximate cause of damage. This has not been done. The record does not show when or why the sale by complainant to the Lebanon Box Company was revoked. It may have been before the car left the Gulf & Ship Island and because of delay regardless of the route of movement. The Lebanon Box Company was in need of lath and agreed to buy this lath because it was in transit and quick delivery could be looked for. Complainant refused to accept delivery at Wilkes-Barre, the billed destination, although there had been no reconsignment and the charges were the same over the route of movement as over the route designated by the consignor.

"If it were shown that the loss of the sale to the Lebanon Box Company resulted from the misrouting, there would still be no warrant for fixing the amount of damage at the market price of the lath at Hagerstown less the freight to that point. The record does not show that this company was located at Hagerstown or that under the terms of sale the lath was to be delivered there. The instructions that the car 'be held in transit for diversion' were addressed to representatives of the Pennsylvania at Harrisburg and the Cumberland Valley at Chambersburg, as well as the representative of the latter road at Hagerstown.

> "The shipment moved nearly five years ago. Complainant has not proved its case, if it has one, and the complaint should be dismissed."

The assignments of error on which the plaintiff in error relies are as follows:

First. The Court erred in sustaining the demurrer of defendant to the petition of the plaintiff.

Second. The Court erred in holding Section 206 (f) of the "Transportation Act of 1920," in its application of this case, to be in violation of the Fifth Amendment to the Constitution of the United States.

Third. The Court erred in holding that the Fifth Amendment to the Constitution of the United States necessitates a construction of section 206 (f), "Transportation Act of 1920," which excludes the present cause from the operation and benefit thereof.

(fol. 39) Fourth. The Court erred in entering judgment in favor of the defendant.

PERIOD OF LIMITATION.

I.

It would imperil constitutional government for the courts unnecessarily to adopt rules of construction which would render statutes inoperative. Hence, even every word and phrase of a statute must be accorded some operative effect and meaning if possible.

Louisville & Nashville R. Co. vs. *Mottley*, 219 U. S., 467.

Washington Market Co. vs. *Hoffman*, 101 U. S., 115.

United States vs. *Lexington Mill Co.*, 232 U. S., 399.

United States vs. *Fisher*, 109 U. S., 145.

Blair vs. *Chicago*, 201 U. S., 400.

United States vs. *United Verde Copper Co.*, 196 U. S., 207.
Brunswick Terminal Co. vs. *Baltimore Nat'l Bank*, 192 U. S., 386.

II.

Section 206 (f) "Transporation Act of 1920," expressly designates "claims for reparation to the Commission for causes of action arising prior to Federal control" and provides that "the period of Federal control shall not be computed as a part of the period of limitations" in such actions.

Transportation Act of 1920, sec. 206 (f).

III.

The only "period of limitation" applicable to "claims for reparation to the Commission" during the period of Federal control was two years.

Interstate Commerce Act, sec. 16.
Lakewood Engineering Co. vs. *New York Central*, 2 F (2d) 121.

IV.

Congress leaves no doubt of the fact that the term, "Federal control," as used in the "Transportation Act of 1920," relates back to the seizure by the President under his proclamation of December 26, 1917—a period of more than two years' duration.

Transportation Act of 1920, sec. 2.

V.

Since the period of Federal control exceeded the limitation period on reparation claims, it is evident that those provisions of section 206 (f), "Transportation

Act of 1920," which specifically relate to reparation claims antedating Federal control must be construed either retroactive or, in the alternative, wholly void.

VI.

In the exercise of its paramount discretion and authority, not only in carrying on war in the field but also in counteracting the misfortunes caused by war, Congress had full power to restore civil rights which had lapsed while the nation was engaged in hostilities.

Stewart vs. *Kahn*, 11 Wall., 493.
Mayfield vs. *Richards*, 115 U. S., 137.
Wenatchee Produce Co. vs. *Great Northern Ry. Co.*, 271 Fed. 784

VII.

Section 206 (f), "Transportation Act of 1920," in its application to reparation claims, is both retroactive and valid.

Lakewood Engineering Co. vs. *New York Cent. R. Co.* 2 F. (2d), 121.
San Diego & A. Ry. Co. vs. *A. T. & S. F. Ry. Co.*, 293 Fed., 139.
Arcadia Mills vs. *Carolina C. & O. Ry.*, 293 Fed., 639.

TRIAL BY JURY.

VIII.

It is well settled that the defendant's right to a jury trial was adequately preserved by section 16, Interstate Commerce Act.

Meeker vs. *Lehigh Valley R. Co.*, 236 U. S., 412.

POWERS OF THE COMMISSION.

IX.

The shipper having designated a prescribed route for the shipment of his freight, it was the duty of the carriers under the Interstate Commerce Act to observe the shipper's limitations on their authority.

Interstate Commerce Act, sec. 15.

X.

Failure to observe the requirements of the Interstate Commerce Act gave lawful ground for an action against the carriers before the Commission.

Interstate Commerce Act, sec. 9.

XI.

Since the plaintiff elected to bring an action before the Commission, it was the duty of the Commission to award both general and special damage.

Louisville & Nashville R. Co. vs. *Ohio Valley Tie Co.*, 242 U. S., 288.

XII.

By taking plaintiff's property away from the prescribed route and losing it, so that it could not be stopped enroute and diverted, the plaintiff was given the right, at its own election, to consider the bailment ended by the unlawful divestiture of plaintiff's authority over it and to hold the carriers responsible for the value of the lost property.

Phillips vs. *Brigham*, 26 Ga., 617, 71 Am. Dec., 227, quoting *Wheelock* vs. *Wheelwright*, 5 Mass., 104.

A. T. & S. F. Ry. Co. vs. *Schriver* (Kans.), 84 Pac., 119, 4 LRA.(NS.), 1056.
Lewis vs. *Galena & C. V. R. Co.*, 40 Ill., 281.
M. S. & N. I. R. Co. vs. *Day*, 20 Ill., 375.
Southern V. The South Staffordshire Ry. Co., 18 Ex., 341, 22 L. J. Ex., 121, 17 Jur., 241, 1 W. R., 154, 155 Eng. Reprint 1378.

XIII.

Since the breach of the Interstate Commerce Act in this case was tantamount to a conversion of the property, the same sound legal rules whereby damages are assessed for conversion of property are applicable and the defendant is liable to the plaintiff for the value of its lost carload of lumber.

XIV.

The plaintiff, if successful in the present action, will be entitled to have a reasonable amount, in addition to other costs, taxed against defendant as an attorney's fee.

Interstate Commerce Act, sec. 16.

Conclusion.

It appears from the aforequoted cases and authorities that section 206 (f) "Transportation Act of 1920" refers to two different and distinct characters of proceedings, namely:

1. "Actions at law."

2. "Claims for reparation to the Commission *for causes of action arising prior to Federal control.*"

The court has held in the case of *Fullerton-Krueger Lumber Co.* vs. *Northern Pacific R. Co.*, (45 Sup. Ct. Rep.,

143), that the limitation contained in the italicized words aforequoted do not relate to "actions at law."

It is respectfully submitted that there is no excape from a construction which gives these words full application to "claims for reparation." Since there were no such claims which remained unbarred by limitations when the "Transportation Act of 1920" was enacted, the words must necessarily have a retroactive application, if any.

The manifest advantage of trying cases like the present before a commission outweigh all valid objections. How was the plaintiff to know who was at fault for misrouting his goods? Did the Gulf & Ship Island Railroad Company fail to convey to connecting carriers the shipper's routing instructions? Did a connecting carrier violate the instructions with knowledge of them? If so, which of the several carriers was at fault?

At law, several suits would practically have been necessary—one against each separate carrier. Several bills for discovery might have been necessary. Even then, the possibility of securing a just recovery would have been doubtful.

Before the Commission, all participating carriers were joined in a single action. The evidence was principally given by the carriers in an effort to fix liability among themselves. There was little cost, a minimum of delay, *and a just determination.*

In the simplification of procedure, this case, we hope, will have an important place. Many similar cases can be adjusted informally by the Commission without suit, if once its power in such matters is clearly established.

Very respectfully submitted,

BRENTON K. FISK,
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Brenton K. Fisk

DEFENDANT'S BRIEF

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1924

No. 346

WILLIAM DANZER & COMPANY, INC., a corporation,

Plaintiff in Error,

vs.

GULF AND SHIP ISLAND RAILROAD COMPANY, A Corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Section 206-f of the transportation act violates the fifth amendment of the constitution and is void if intended to revive causes of action barred at the time of its enactment under section 16 of the act to regulate commerce. Section 16 of the act to regulate commerce provides:

> "All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after."

Section 206-f of the transportation act of 1920 provides:

> "The period of federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims

for reparation to the Commission for causes of action arising prior to federal control."

A complaint was filed with the Interstate Commerce Commission on February 14, 1921, seeking damages for the misrouting of a shipment which was delivered to the carrier August 30, 1917, and which was refused at destination because of the misrouting on October 3, 1917. The cause of action accrued therefore about two and a half years before the enactment of the transportation act. It accrued three and a half years before complaint was filed. The Interstate Commerce Commission held that section 206-f of the transportation act revived the cause of action and ordered reparation. On a suit brought to enforce the order of the Commission the lower court held that such construction would violate the fifth amendment and render the section void.

The present issue is, first, whether the construction of the Interstate Commerce Commission is correct, and, second, whether the act is constitutional if given this construction.

The Interstate Commerce Commission has no common law jurisdiction. It is a creature of statute and can deal with only such subjects and administer only such relief as are delegated to it by acts of congress creating it and fixing its jurisdiction. These are both created and limited in accordance with the provision of section 16 of the act to regulate commerce. A statute creating a cause of action or a remedy and providing a time within which rights thereunder may be asserted is not an ordinary statute of

limitation, but a limitation upon the cause of action. The time limit is itself a part of the cause of action. If complaint be not filed within the time limit, the cause of action dies. That section 16 is such a statute has been twice decided in this court. In *A. J. Phillips Company v. Grand Trunk Western Railway* (236 U. S. 662, 59 L. ed. 774) the court held:

> "Under such a statute the lapse of time not only bars the remedy, but destroys the liability (Finn v. U. S., 123 U. S. 227, 232, 31 L. ed. 128, 130), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction."

In *Kansas City Southern Railway Company v. Wolf* (261 U. S. 133, 67 L. ed. 571) the court held:

> "The lapse of time had destroyed any liability by the carrier to the shipper or his assignee."

These decisions are in complete harmony with the general construction of other statutes creating causes of action with time provisions. In *Finn v. U. S.* (123 U. S. 227, 31 L. ed. 128) suit was instituted in the court of claims against the United States after the expiration of the time fixed in the statute within which such suits might be brought. The court held the time limit to be "a condition or qualification of the right to a judgment against the United States." The same construction applies to Lord Campbell's Act providing for the recovery of damages for wrongful death. In *The Harrisburg v. Rickards* (119 U. S. 199, 30 L. ed. 358) the court held:

> "The time within which the suit must be brought operates as a limitation of the liability itself as created and not of the remedy alone. It is a condition attached to the right to sue at all. . . . Time has been made of the essence of the right, and the right is lost if the time is disregarded."

It may be conceded, under the doctrine of *Campbell v. Holt* (115 U. S. 620, 29 L. ed. 483) that congress may remove the bar of an ordinary statute of limitation even after the right of defense thereunder has attached. but the doctrine of the Holt case does not apply to the character of limitation in section 16 of the act to regulate commerce or to other statutes of the kind before referred to. The ordinary statute of limitation (the kind construed in the Holt case) is no part of the cause of action. It is no condition of the right to sue. It is simply a bar created by statute to prevent a suit upon a cause of action already existing at common law which, but for the bar, would continue indefinitely. Such a period of limitation is in striking contrast to that found in section 16. For example, the Holt case declares that an ordinary statute of limitation is waived unless specially pleaded, but a carrier of interstate commerce is not permitted to waive the time limit of section 16. The case of *A. J. Phillips v. Grand Trunk Western Railway*, heretofore cited, holds:

> "The obligations of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would have made it illegal for the carriers

> either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some, and to waive it against others, would be to prefer some and discriminate against others, in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defences open to the carrier. The railroad company therefore was bound to claim the benefit of the statute here, and could do so here by general demurrer."

The Holt case declares that the limitation there considered "does not destroy the right in foro conscientiae to the benefit of assumpsit, but only bars the remedy if the defendant chooses to rely on the bar." Under the Phillips case the court said: ". . . the lapse of time not only bars the remedy, but destroys the liability."

The fundamental difference in these statutes becomes more apparent in considering another phase of this case. If plaintiff in error had filed its complaint before the Interstate Commerce Commission after October 3, 1919 (the date of the expiration of the two year limit) and prior to February 29, 1920 (the date of the enactment of the transportation act), the carrier would have been compelled to interpose as a defense the expiration of the time limit within which suit might have been brought. The commission would have been compelled under the Phillips case to sustain the defense. Sufficient time in fact existed for the suit to have been filed and tried between October 3, 1919 and February 29, 1920. Suppose this had been done. By operation of law, the same law that created the right of action, the carrier acquired a vested right of defense on October 3, 1919, which defense could not have been waived. A cause of action, unlike the bar of a statute of limitation, that has ceased to exist is the same as a cause of action which never existed. Under such circumstances section 5 of the constitution prevents congress from reviving it. The principle is decided in *Pritchard v. Norton* (106 U. S. 124; 27 L. ed. 104):

> "Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the Legislature to take it

> away. A vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract, and are not based on equity and justice."

Apparently the precise question presented in this case was decided in the recent case of *Fullerton-Krueger Lumber Company vs. Northern Pacific Railway Company* (45 Sup. Ct. Rep. 143, 69 L. ed. —) on January 5, 1925. The court held that section 206-f of the transportation act would not be held to apply to a cause of action barred before the act became effective.

Plaintiff in error argues that the Fullerton decision is inapplicable to the instant case because the instant case is an action at law and the Fullerton case was not. However, no such distinction is drawn in the Fullerton case, nor does it seem to be implied. In reality, the right asserted in the Fullerton case and the right asserted in the instant case are both conferred by the act to regulate commerce. In the Fullerton case a recovery was sought for damages in excess of the lawfully published tariff rate. In this case a recovery is sought for the failure of the carrier to follow the routing instructions of the shipper. At common law the shipper had no right to route the shipment. The carrier's obligation was simply to effect delivery. The shipper could not control the agencies through which the delivery was to be effected. It is not, however, of any material con-

sequence how this or any other claim predicated upon the act to regulate commerce be characterized. Such claim if filed at all with the Interstate Commerce Commission must be filed within two years from its accrual, for section 16 specifically prohibits "all claims for the recovery of damages" filed thereafter. As this complaint was filed after it had been destroyed, it would seem to come squarely within the doctrine of the Fullerton case.

Another argument advanced to support the constitutionality of section 206-f of the transportation act is that congress was exercising a war power. The transportation act was legislation distinctly looking forward to the restoration of the railroads to their former owners. It did not, even remotely, affect the conduct of the war, but, if it had, it is not true that congress has the right to destroy constitutional guaranties and rights even in time of war. A leading case on this subject is *Johnson v. Jones* (44 Ill. 142, 92 Am. Dec. 159). The precise question has been lately decided by this court, in *United States v. Cohen Grocery Company* (255 U. S. 81, 65 L. ed. 516), and in *Kennington v. Palmer* (255 U. S. 100, 65 L. ed. 528). In the Cohen case Chief Justice White stated:

> "We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaran-

> ties and limitations of the 5th and 6th Amendments as to questions such as we are here passing upon. . . . It follows that, in testing the operation of the Constitution upon the subject here involved, the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view."

Section 206-f obviously cannot be defended as a war measure, for the further reason that the war did not restrict the plaintiff in the exercise of any of its rights against the defendant. There was no time between the accrual of the right of action and its expiration when plaintiff could not have filed its complaint with the Interstate Commerce Commission and secured redress. If section 206-f was intended by congress to be given a retroactive construction, it was not a war measure it was enacting but a measure calculated to protect negligent complainants from the results of their own inexcusable delay.

If, as the court decided in the Fullerton case, section 206-f is to be given prospective application only or if it is held that it does not revive a cause of action already barred, then no constitutional question is presented in this case, but if congress intended that the act should apply to cases already barred under section 16 of the act to regulate commerce, then it is respectfully submitted that with reference to a case barred it is violative of the 5th amendment and void.

In the court below it was argued that the Interstate Commerce Commission was without constitutional authority to pass upon this case for the reason that the defendant was entitled upon the issue of fact involved to a trial by jury. The presiding judge, however, did not pass upon this point, hence it will not be argued at this time.

Respectfully submitted,

B E Eaton

Attorney for Defendant in Error.

I hereby certify that on this, the 3 day of April, 1925, I forwarded, postage prepaid, three copies of this brief to Mr. Brenton K. Fisk, Attorney of record for plaintiff in error.

B E Eaton

Attorney for Defendant in Error.